

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**



74-1019

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

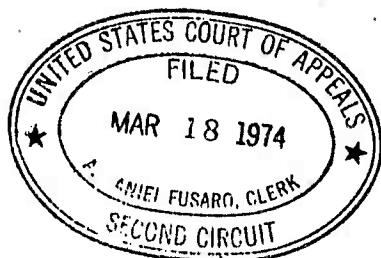
BIENVENIDA MARTINEZ,

Appellant.

Docket No. 74-1019

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,  
THE LEGAL AID SOCIETY,  
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PHYLIS SKLOOT BAMBERGER,  
Of Counsel

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JUDGE BONSAI

73 CRIM. 343

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
BIENVENIDA MARTINEZ	Robert M. Henley, AUC. 264-6462
	For Defendant:

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	BY
(06) Fine,					
Clerk,					
Marshal,					
Attorney,					
Deft. (att. present) Pleads Not Guilty thru interpreter Melvyn Quin					
Motions returnable in 10 days. Case assigned to Judge Bonsai for all					
purposes.					
Duffy, J.					
11-13-73 Jury trial begun before Judge Bonsai. Both sides rest. motions to					
dismiss and for judgment of acquittal denied. Bonsai, J.					
11-14-73 Trial cont'd and concluded. Jury verdict deft Guilty Cts 1,3. Pre-					
sentence report ordered. 12-28-73 set for sentence. Deft					
released on own recognizance. Bonsai, J.					

DATE	PROCEEDINGS
9-4-73	Filed indictment.
9-17-73	Deft. (att. present) Pleads Not Guilty thru interpreter Melvyn Quin Motions returnable in 10 days. Case assigned to Judge Bonsai for all purposes. Duffy, J.
11-13-73	Jury trial begun before Judge Bonsai. Both sides rest. motions to dismiss and for judgment of acquittal denied. Bonsai, J.
11-14-73	Trial cont'd and concluded. Jury verdict deft Guilty Cts 1,3. Pre- sentence report ordered. 12-28-73 set for sentence. Deft released on own recognizance. Bonsai, J.

DATE	PROCEEDINGS	CLERK'S F.
		PLAINTIFF
12-28-73	Filed JUDGMENT (atty present) It is adjudged that the imposition sentence on counts 1 and 3 is suspended. Deft is placed on probation for a period of TWO (2) YEARS on each of counts 1 and to run concurrently with each other, subject to the standing bation order of this Court. Special conditions of probation that the deit observe all directions given her by the Immigr and Naturalization Service. Counts 2 and 4 are dismissed on of deit's counsel with consent of the Govt. Bonsor, J. 1-4-74 Copies delivered to probation office.	
1-3-74	Filed notice of appeal from judgment dtd 12-28-73. Mailed copies to Legal Aid Society & B. Martinez. Leave to appeal in forma pauperis is granted. Bonsor,	
	A TRUE COPY RAYMOND E. BURCHARDT Clerk By <i>M. J. Paine</i> Deputy Clerk	

94:nc

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

73 CRIM. 842

UNITED STATES OF AMERICA,

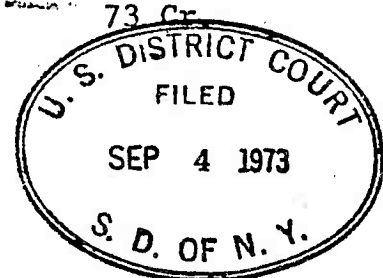
- v -

BIENVENIDA MARTINEZ,

Defendant.

INDICTMENT

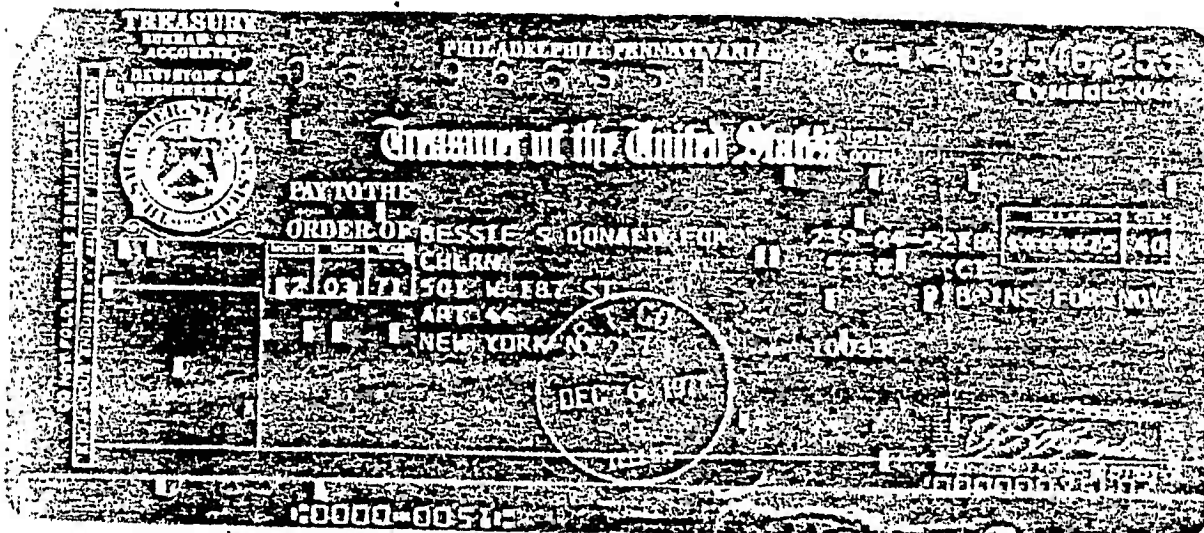
73 Cr



COUNT ONE

The Grand Jury charges:

On or about the 3rd day of December, 1971, in the Southern District of New York, BIENVENIDA MARTINEZ, the defendant, unlawfully, wilfully and knowingly falsely made, forged and counterfeited a writing, namely, the endorsement of the payee on a check, to wit, the words "BESSIE DONALD", on the back thereof, for the purpose of obtaining from the United States and its officers and agents a sum of money, the check being a genuine obligation of the United States, and of the following tenor:



B-1

4:nc

COUNT TWO

The Grand Jury further charges:

On or about the 3rd day of December, 1971 in the Southern District of New York, BIENVENIDA MARTINEZ, the defendant, unlawfully, wilfully and knowingly and with intent to defraud the United States, uttered and published as true and caused to be uttered and published as true a false, forged and counterfeited writing, namely, the endorsement of the payee on a check knowing the same to be false, forged and counterfeited, the check being that described in the first count of this indictment.

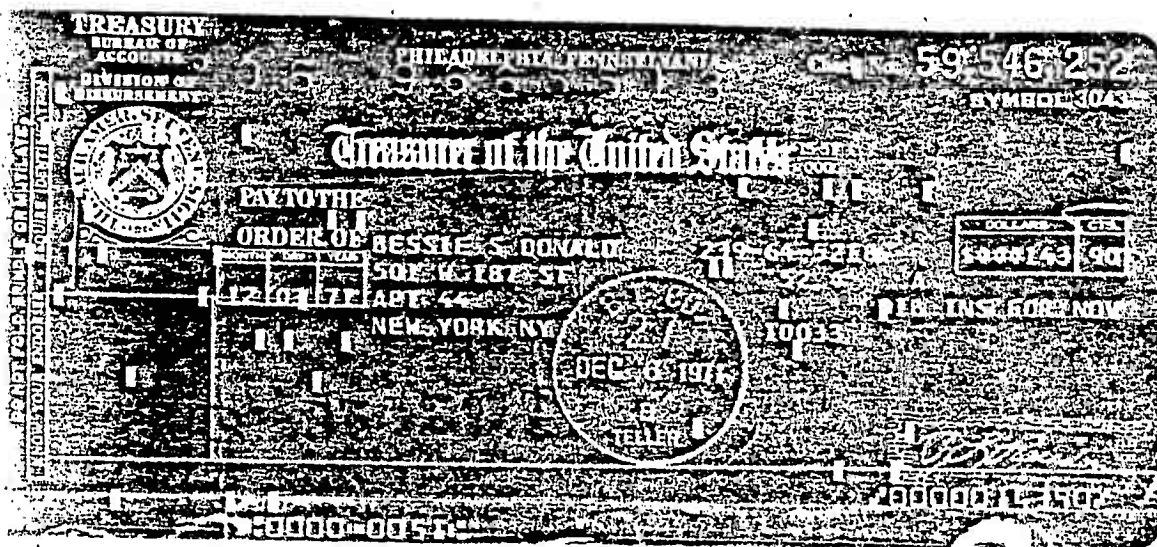
(Title 18, United States Code, Section 495.)



COUNT THREE

The Grand Jury further charges:

On or about the 3rd day of December, 1971 in the Southern District of New York, BIENVENIDA MARTINEZ, the defendant, unlawfully, wilfully and knowingly falsely made, forged and counterfeited a writing, namely, the endorsement of the payee on a check, to wit, the words "BESSIE DONALD" on the back thereof, for the purpose of obtaining from the United States and its officers and agents a sum of money, the check being a genuine obligation of the United States, and of the following tenor:

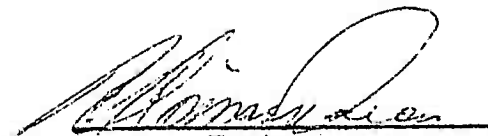


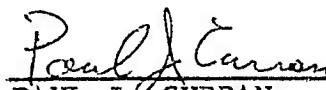
COUNT FOUR

The Grand Jury further charges:

On or about the 3rd day of December, 1971 in the Southern District of New York, BIENVENIDA MARTINEZ, the defendant, unlawfully, wilfully and knowingly and with intent to defraud the United States, uttered and published as true and caused to be uttered and published as true, a false, forged and counterfeited writing, namely, the endorsement of the payee on a check knowing the same to be false, forged and counterfeited, the check being that described in the third count of this indictment.

(Title 18, United States Code, Section 495).

  
Foreman

  
PAUL J. CURRAN  
United States Attorney

DEL. 1. 1971 SEC. 1. 1971 1-10

# United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

BIENVENIDA MARTINEZ,

Defendant.

## INDICTMENT

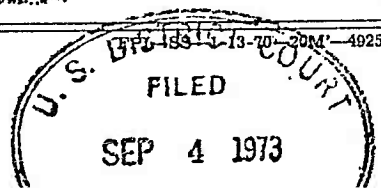
18 U.S.C. §495

PAUL J. CURRAN

United States Attorney

A TRUE BILL

Foreman



NOV 11 1973 Dep appears with attorney (partner)  
 Dep pleads not guilty thru interpreter Melvin  
 Quinones. Case assigned to Judge Bonсал  
 Dep has 10 days to make any motions.

NOV 13 1973 JURY EMPOWERED, TRIAL BEGON,  
 ASST. D.A. J. TIMBERS, DEPT. ATT. LEGAL AID J. CURLEY!  
 BOTH SIDES REST, MOTIONS TO DISMISS AND FOR  
 JUDGMENT OF ACQUITTAL DENIED

NOV 14 1973 SUMMONATIONS BY COUNSEL CHARGE BY THE  
 COURT, MARSHAL SWORN, JURY VERDICT DEPT  
 GUILTY CTS 1, 3, PRESENTENCE REPORT  
 ORDERED DEC 28 1973 SET FOR SENTENCE  
 DEPT. R.O.R.

DEC 28 1973 SENTENCE BIENVENIDA MARTINEZ  
 (LEGAL AID J. CURLEY/ASST. D.A. J. TIMBERS  
 INTER. MEL. QUINONES PRESENT)

CTS 1, 3 IMPOSITION OF SENTENCE SUSPENDED  
 DEPT. PLACED ON PROBATION FOR 2 YEARS  
 ON EACH CT. TO RUN CONCURRENTLY

SPECIAL CONDITIONS DEPT. TO OBSERVE  
 ALL DIRECTIONS GIVEN HER BY THE IMMIGRATION  
 AND NATURALIZATION SERVICE OPEN CTS 2, 4,  
 DISMISSED UPON CONSENT OF THE GOVT.  
 DEPT. TO APPEAL

mdh

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United States of America  
v.

Bienvenida Martinez

73 Cr. 842

11/14/73<sub>4</sub>

CHARGE OF THE COURT

(Bonsal, J.)

---

THE COURT: Madam forelady as you are Miss Marro by virtue of occupying the first chair, and ladies and gentlemen of the jury: First I would like to thank each of you for the attention that you have given during this short trial and to tell you that I appreciate the sacrifices that each of you has been called upon to make in your own private lives so that you could serve in this very important capacity of being on a federal jury.

I am sure you will bear with me and give me the same degree of attention that you have shown throughout so that you can understand the principles of law which apply to this case.

Remember I told you yesterday when we started that it is your duty here to consider the evidence calmly and dispassionately without any sympathy, without any prejudice, for or against either this defendant, Mrs. Martinez, or the government. I told you that everyone appearing before this bar of justice is entitled to a fair and an impartial trial regardless of his or her occupation or

station in life.

I told you that your verdict must be based solely on the testimony you heard from that witness chair and the exhibits which were received during the course of trial and on nothing else at all.

In our system of justice, ladies and gentlemen, it is my function to set forth the rules of law which apply here and on this, as I told you, you must accept my instruction. On the other hand, you ladies and gentlemen are the judges of facts, and it is not what a lawyer says a witness testifies to or what a document contains or what it might say on these subjects, what it is you the jury remember and recall.

I also told you yesterday that during the trial I would have conversations with one or the other of the lawyers. Indeed, I did. I told you then and I repeat now don't pay any attention to those conversations. Above all, don't infer from anything you may have said during this trial that I favor one side or the other in this controversy because of course I do not. That is your function, and not mine.

Throughout my charge, ladies and gentlemen, I will instruct you that you may not convict the defendant, Mrs. Martinez, unless you find that the government has

1 proven each element comprising the crimes charged beyond  
2 a reasonable doubt.  
3

4 What do we mean by beyond a reasonable doubt?  
5 Well, the words themselves suggest the answer, of course.  
6 It is a doubt based on reason, a doubt which a reasonable  
7 man or woman might entertain. But a reasonable doubt is not  
8 a fanciful doubt, it is not an imagined doubt, it is not a  
9 doubt that a juror might conjure up in order to avoid  
10 performing an unpleasant task. It is a reasonable doubt,  
11 it is a doubt which arises in a juror's mind because of  
12 something in the evidence in the case or the absence of  
13 evidence in the case, it is the kind of doubt which would  
14 cause a reasonable man or woman in a serious and im-  
15 portant affair in his or her own life to hesitate to act,  
16 and it is the burden of the government to prove the guilt  
17 of this defendant beyond a reasonable doubt.

18 The government need not prove the defendant's  
19 guilt beyond all possible doubt because if that were  
20 the rule few people no matter how guilty they might be  
21 would ever be convicted. In this world of ours it is  
22 practically impossible for one to be absolutely and com-  
23 pletely convinced of any controverted fact which by its  
24 nature is not susceptible of mathematical certainty, so  
25 the law is that the government must prove that a defendant

is guilty beyond a reasonable doubt, not beyond all possible doubt.

As I told you yesterday, ladies and gentlemen, the indictment here is merely the charge, the way the government brings into court individuals who it claims have violated the law. The indictment is not evidence of the guilt of Mrs. Martinez, nor does it detract in any degree from the presumption of innocence with which the law surrounds her until her guilt has been proven.

This presumption of innocence remains with Mrs. Martinez throughout the trial and applies to each of the essential elements of the crimes charged, and this presumption of innocence remains unless and until you the jury should find that the defendant is guilty beyond a reasonable doubt.

Mrs. Martinez has pled not guilty here and by doing so she has put in issue every material allegation in the indictment. As I have told you, the burden is on the government and has remained throughout, to prove each of these elements beyond a reasonable doubt.

If the government has not proved this to you then of course it is your duty to find the defendant, Mrs. Martinez, not guilty.

This has been a very short trial, ladies and

gentlemen , and the evidence has been marshaled for you by the lawyers. I don't intend to review it all again. Of course, it is your recollection that governs and not what they or I might say on these subjects.

As I understand it here, the government is contending that Mrs. Bienvenida Martinez unlawfully, wilfully and knowingly -- remember those words, unlawfully, wilfully and knowingly -- endorsed the name Bessie Donald on the back of each of these two government checks, and deposited these checks in a savings account at the Bankers Trust Company intending to defraud the government by obtaining the money from these checks for herself.

The defendant denies this contention and as I understand it she concedes she did sign Bessie Donald on the back of the checks and deposited the checks in her savings account, and she did this to hold the money for the rightful owner. She says she did wrong, I think, but she denies that she had any criminal intent here to commit any crime at all.

The indictment here has four counts, ladies and gentlemen, and I will send you a copy of the indictment when I finish my charge. I remind you it is merely the charge and not any evidence against Mrs. Martinez.

Counts 1 and 3 of the indictment refer to the



signing of Bessie Donald on the back of the checks,  
and I will take them together. Counts 2 and 4 refer  
to the depositing of the checks in her account. The legal  
term is utter. All that means is that she used the checks  
for her own benefit. So I will call counts 1 and 3  
the endorsement counts, and counts 2 and 4 I will call  
the deposit counts.

With respect to 1 and 3, the statute involved --  
1 and 3 being the endorsement counts -- is Section 495  
of Title 18 of the United States Code, which provides  
to the extent here relevant that whoever falsely makes, [or]  
forges any writing on a check for the purpose of obtaining or  
receiving either directly or indirectly, from the United States  
any sum of money is guilty of a crime.

Here you will recall there are two checks,  
the first one being in count 1 the \$75 check which was  
Exhibit 1, and in count 3 is the \$143 which is Exhibit 2.  
I have left out the cents.

With respect to each of these two counts the  
government must prove beyond a reasonable doubt first that  
on or about December 3, 1971, the defendant, Mrs. Martinez,  
wrote the endorsement Bessie Donald, the name of the payee  
of the check, on the back of the two checks -- that is,  
she endorsed them.

1 mdh  
2 I don't think there is any disagreement about  
3 that. Everybody agrees that she did write Bessie Donald's  
4 name on them.

5 Second, that the endorsement was a forgery.  
6 And all that means from the point of view of this case is  
7 that she wrote the name of Bessie Donald without Mrs.  
8 Donald's authority. Here again Mrs. Donald testified  
9 that she did not authorize anyone to sign her name, and  
10 defendant concedes she did sign Bessie Donald's name, of  
11 course the defendant does not say she was acting with a  
12 criminal intent, that she may have been wrong.

13 The third allegation is that these were genuine  
14 obligations of the United States. There is no dispute  
15 about that, these were genuine obligations of the United  
16 States.

17 The fourth element, finally, is that the endorse-  
18 ment of Bessie Donald made by the defendant on the checks  
19 was made with the intent to defraud the United States.

20 All that means here is that the defendant endorsed  
21 these checks intending to obtain money from the United  
22 States in some way, here of course by depositing the money  
23 in her savings account. And here the defendant denies that  
24 she intended to defraud the United States, she contends  
25 she was doing this to wait for the rightful owner.

1  
2 If the government has not proved these elements  
3 beyond a reasonable doubt -- and of course the last element  
4 I read to you is the only one in dispute --  
5 then of course you should find the defendant not guilty  
6 on counts 1 and 3. But on the other hand if you find the  
7 government has proved these elements beyond a reasonable  
8 doubt then you should find the defendant guilty on counts  
9 1 and 3.

10 Turning to counts 2 and 4 of the indictment,  
11 they are the deposit counts. All they charge here is that --  
12 there is a lot of language in here -- that she deposited,  
13 she uttered the checks by depositing them in her own  
14 account.

15 As to the statute here, it is the same section  
16 as I previously referred to, and it goes on to say "Whoever  
17 utters or publishes as true any such forged writing" --  
18 that is, whoever utters or publishes as true these checks,  
19 such as taking them to the bank and saying Mrs. Bessie  
20 Donald's endorsement, put them in my account -- "with  
21 intent to defraud the United States, knowing the same  
22 to be false, forged or counterfeited," is guilty of a crime.

23 So here on counts 2 and 4, the deposit counts,  
24 the government must prove to you beyond a reasonable doubt  
25 the following elements.

1 mdh  
2 First, that the endorsement Bessie Donald on  
3 each of the two checks was a forgery. I have reviewed  
4 that with you in counts 1 and 3.

5 Second, that on or about December 3, 1971, the  
6 defendant deposited each of the two checks in her bank  
7 account. I think I heard in the summations that that was  
8 done on December 6th instead of December 3rd, but that is  
9 quite immaterial.

10 And here again I recall that defendant Mrs.  
11 Martinez testified that she did deposit the checks in her  
12 savings account.

13 Third, that the checks were genuine obligations  
14 of the United States. There is no dispute that they were.

15 And, finally, the fourth element, that the  
16 defendant deposited the checks in her savings account  
17 intending to defraud the United States. Here again all  
18 that means is that she deposited the checks in her savings  
19 account because she intended to obtain the use of the  
20 money. And this, of course, is in dispute.

21 Again, if the government has not proven to you  
22 each of these elements in counts 2 and 4 you should find  
23 the defendant not guilty on those counts 2 and 4 you should  
24 find the defendant not guilty on those counts. If you find  
25 that the government has proved each of these counts then

1           you should find the defendant guilty.

2                       Going back a minute -- because this is the key  
3 element here, conceded so by both sides -- and that is  
4 the knowledge of Mrs. Martinez when she did these things,  
5 remember I told you that the statute speaks of unlawfully,  
6 wilfully and knowingly. In other words, did Mrs.  
7 Martinez have the criminal intent here in endorsing Bessie  
8 Donald's name on the back of these checks and depositing  
9 them in her savings account?  
10

11                   This is really the key element here.

12                   Well, an act is done knowingly and wilfully  
13 if it is done voluntarily and purposely. An act is done  
14 wilfully, knowingly and unlawfully if it is done with an  
15 evil motive or purpose, such as cheating the government.  
16 But an act is not done wilfully, knowingly or unlawfully  
17 if it is done by mistake, if it is done by carelessness,  
18 or if it is done by other innocent reason.

19                   Obviously, we can't look into Mrs. Martinez's  
20 mind to prove what she knew and what she intended to do  
21 on these occasions. We cannot look into her mind to see  
22 what knowledge she had for the purpose of determining  
23 her specific intention. But these are matters which  
24 you, the jury, must determine from a careful consideration  
25 of the facts and circumstances. Knowledge and intentions

1 of a defendant may only be understood and put into the  
2 context of the circumstances surrounding her acts and the  
3 inferences which you the jury find may be reasonably drawn  
4 therefrom.  
5

6 You might ask yourselves whether these trans-  
7 actions were normal or abnormal, whether you think the  
8 background of the defendant made it likely or unlikely  
9 that she fully understood what she was doing, whether you  
10 think the defendant had a motive, whether you think she had  
11 a financial interest to be served in doing it.

12 These are the kind of questions, ladies and  
13 gentlemen, and of course not the only ones, that you should  
14 ask yourselves in order to determine the knowledge and  
15 intentions of this defendant. Of course, I don't suggest  
16 any answers to these questions; in your own daily affairs  
17 each of you is continually called upon to use your common  
18 sense and experience to determine from the actions and  
19 statements of others what their real intentions and purposes  
20 are. So please do exactly the same thing here with respect  
21 to the knowledge and intentions of Mrs. Martinez.

22 Now, you will recall there was testimony -- I  
23 believe it was by Miss Cruz -- that Mrs. Martinez stated  
24 to her and a special agent something about receiving  
25 a check from a person in Santo Domingo in payment for some

1 kind of merchandise. You will remember there was some  
2 testimony to that effect. And later there was also  
3 testimony I think from Miss Cruz that she had told her  
4 and the special agent that she had received these checks  
5 at the check address where her sister was residing, and  
6 I think the defendant said something about this was so.  
7

8 Now, the government contends these statements  
9 were false, that she was trying to cover up. Of course,  
10 the defendant denies that. But if after considering  
11 all of the evidence you find that these statements, or  
12 any of them, attributed to the defendant were false  
13 then you may consider that statement as circumstantial  
14 evidence of a guilty consciousness on the part of the de-  
15 fendant, and you may consider it as having probative force  
16 on the issue of the defendant's knowledge and intent,  
17 which I have just reviewed with you.

18 You heard several witnesses for the government  
19 and Mrs. Martinez testify herself, and you, the jury,  
20 are the exclusive judges of the credibility of those  
21 witnesses. And of course it is the quality of the testimony,  
22 the testimony you think represented the true picture of  
23 what happened here, and in considering the credibility  
24 of these witnesses, ladies and gentlemen, again please  
25 use your plain, everyday common sense. You saw the witnesses

on the stand. How did they impress you?

Did you think they are testifying frankly, candidly, and fairly?

So apply your common sense and experience just as you are called upon in determining an important matter in your own lives when you are called upon to decide whether you have been given a true picture of a given situation. I think you would take into account a witness' demeanor, or his background, occupation or business, a witness' candor or lack of it, a witness' possible bias, and you would consider whether a witness has been contradicted or supported by other credible testimony or circumstances.

Mrs. Martinez took the stand. She obviously has a vital interest in this case, she is the defendant. And her interest is one of the matters that you should take into consideration in determining the credibility which you give to her testimony. You obviously should consider her testimony with great care. But of course you may conclude that Mrs. Martinez was telling the complete truth to you, despite her interest in the outcome of this trial.

If you believe that any witness has been impeached or discredited then it is your exclusive province to give the testimony of that witness such credibility, if any, which you think it deserves. You can accept part of a



witness' testimony if you believe it and you can reject the rest of it if you don't believe it.

You should also consider the strength or the weakness of a witness' recollection. Sometimes a witness may have a weak recollection on the subject or a witness may be incapable of accurately setting forth what he or she observed or did.

As I told you, ladies and gentlemen, there are four counts here, the first two being the endorsement counts, and the other two being the deposit counts. Each of them charges a separate crime, and each count should be considered by you separately. And, of course, the fact that you may find the defendant guilty or not guilty on one count does not control your verdict with respect to the remaining three counts.

I will ask -- after you retire I will ask the lawyers to marshal the exhibits which were received during the trial and send them into the jury room so you may have them available in your deliberations. As you deliberate, ladies and gentlemen, please be careful to listen to the views of your fellow jurors as well as to express your own views. A jury deliberation is one in which everybody participates, expresses their views and exchanges views.

1                   mdh  
2                   Don't be afraid to change your original views  
3 because of pride of opinion or stubbornness or any other  
4 reason should you become convinced that your original  
5 view is wrong. But on the other hand, ladies and gentlemen,  
6 never surrender your honest and conscientious conviction  
7 because of the opinion of your fellow jurors or because you  
8 may be outvoted.

9                   You will seek to arrive at a verdict here,  
10 providing you can do this reasonably and consistently  
11 with the conscientious convictions of each and every one  
12 of you.

13                   Obviously it is important to both the government  
14 and to Mrs. Martinez that this case be decided by you,  
15 and you understand, of course, that your verdict here,  
16 this being a criminal case, must be a unanimous verdict,  
17 a verdict joined in by each and every one of you. It is  
18 a verdict which reflects each of your conscientious  
19 convictions.

20                   Should you find that the defendant here is not  
21 guilty please do not hesitate for any reason to render  
22 a verdict of not guilty. But on the other hand if you find  
23 that the law has been violated by the defendant you must  
24 not hesitate to render a verdict of guilty because of  
25 sympathy or any other reason at all.

1                   mdh  
2                   Please don't consider the question of possible  
3                   punishment of the defendant should you find the defendant  
4                   guilty. Please don't let this enter into your deliberations  
5                   at all. The duty of imposing sentence rests on the court,  
6                   and you must not allow any consideration of punishment  
7                   to affect you or make you seek to avoid the performance  
8                   of an unpleasant task.

9                   Finally, I am sure, ladies and gentlemen, that  
10                  if you listen to the views of your fellow jurors and apply  
11                  your common sense here you will reach a fair verdict,  
12                  and remember that that verdict must be rendered without  
13                  fear, without favor, without prejudice and without  
14                  sympathy.

15                  Will counsel come forward, please?

16                  (At the side bar.)

17                  THE COURT: Any exceptions or additions?

18                  MR. CURLEY: I except to the Court's charge  
19                  of interest on behalf of the defendant.

20                  THE COURT: You have an exception to that.

21                  MR. CURLEY: Your Honor, I -- yesterday your Honor  
22                  stated I could have an exception to the false exculpatory  
23                  statement charge.

24                  THE COURT: I will give you an exception.

25                  MR. CURLEY: I wish to amplify at this time,

1           mdh  
2           your Honor, as I understood the Court's explanation  
3           was that the government claimed she had made inconsistent  
4           or false--

5           THE COURT: No, I didn't say made inconsistent.  
6           I said the government contends these statements were false  
7           for the purpose of covering her transaction or something  
8           to that effect.

9           MR. CURLEY: And that the defendant had disagreed  
10          or argues to the contrary. In light of what I consider  
11          to be the defense position I would request an instruction  
12          that affirmatively the defendant argues that they are  
13          not inconsistent, that they were referring to two different  
14          checks or two different incidents, the one incident  
15          referring to the two checks in the indictment and the other  
16          incident referring to the check that was discussed  
17          previously with the bank people.

18          THE COURT: All right.

19          MR. TIMBERS: On the false exculpatory statement  
20          charge as I understand the charge it presently reads that  
21          the government contends that Mrs. Martinez's statements,  
22          one, that she received the check from a man from Santo  
23          Domingo and two, that she received the check in the mailbox  
24          at her own address are incorrect. In fact, it is our position  
25          that only the first statement is incorrect.

1 mdh  
2 THE COURT: Which is the first, the Santo  
3 Domingo.

4 MR. TIMBERS: Right. We have no dispute with the  
5 second statement.

6 THE COURT: You have no dispute with the second  
7 statement?

8 MR. TIMBERS: Right.

9 THE COURT: I will correct that on the false ex-  
10 culpatory statement. I will try to cover both points.

11 Anything else?

12 MR. TIMBERS: Nothing else.

13 THE COURT: I didn't go through reading the  
14 indictment because I thought since the only issue was the  
15 intent it would only confuse them and waste time.

16 MR. CURLEY: I would object to the government's  
17 arguing as to what they think is false. I think that  
18 would be an improper suggestion to the jury. They have  
19 heard the evidence and they have heard the direct and  
20 cross examination.

21 THE COURT: Let me see if I can handle that.

22 MR. CURLEY: My final comment, your Honor, is  
23 that I understood that Mr. Timbers to indicate to the  
24 jury in his summation that the defendant or the jury could  
25 infer that the defendant changed her version of the facts

1           mdh  
2           after being advised by an attorney of the consequences,  
3           and I objected and I understood the court to say that the  
4           jury's recollection will control, but it seems to me that  
5           brings in an issue of sympathy, of punishment, and the fact  
6           that a lawyer may have told the defendant what to do because  
7           of the serious consequences of the crime, and that was  
8           the basis of my objection. I thought it was an improper  
9           comment and one unwarranted by the evidence in the case.

10           THE COURT: You have an exception on the summation,  
11           but not here. All I am worried about is the charge.

12           MR. CURLEY: I am requesting a charge, your Honor,  
13           that the Court instruct the jury that there was no evidence  
14           in the case of such an argument by counsel and it is im-  
15           proper for the jury to consider that comment by the District  
16           Attorney.

17           THE COURT: I don't think I will do that. I will  
18           give you an exception.

19           MR. CURLEY: Thank you.

20           (End of discussion at the side bar.)

21           (In open court, in the presence of the jury.)

22           THE COURT: Counsel have asked me to -- remember  
23           I charged you ladies and gentlemen about the testimony  
24           of Miss Cruz, that the defendant had stated to Miss Cruz  
25           that she had received checks from a person in Santo Domingo

1           mdh  
2           in payment of merchandise. As I understand it there is  
3           some confusion but it is your recollection that controls  
4           as to whether that referred to these particular two checks  
5           or some other check. It is your recollection that controls  
6           on that when you consider it.

7                     Then again really the point on this thing if  
8           you find that this evidence as to these statements is  
9           false, and that is the first thing you have to consider,  
10          only should you find it false can you consider it as  
11          circumstantial evidence of a guilty consciousness on the  
12          part of the defendant.

13                    I think that covers the point, does it not?

14                   MR. CURLEY: Yes, your Honor.

15                   MR. TIMBERS: Yes.

16                   THE COURT: All right, Mrs. Tokoly, you have  
17          served with distinction to this point, and all your fellow  
18          jurors have survived to the time of deliberation, so  
19          it is my pleasant duty to excuse you, but I want you to  
20          realize how important it was that you were here in case  
21          somebody had gotten the flu and didn't show up this morning,  
22          that would have stopped all the machinery. Thank you  
23          very much for coming. What are her instructions?

24                   THE CLERK: Please report back to the Central  
25          Jury Part.

Certificate of Service

Mar 8, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Philip H. Smith